82-1581

No. _____

Office-Supreme Court, U.S.
FILED
MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANETTE E. QUENNEVILLE,
Executrix of the Estate of
Charles F. Quenneville

Petitioner

vs.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.

Respondents

PETITION FOR A WRIT OF CERTIORARI, WITH APPENDIX, TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Hans Scherner

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(614) 221-5207

Counsel for
Petitioner

QUESTION PRESENTED

WHETHER THE TRIAL COURT SHOULD HAVE PERMITTED THE PLAINTIFF TO DISCOVER:

A. WHETHER ANY PERSONS OTHER THAN THE PLAINTIFF HAD COMPLAINED TO THE DEFENDANT HOSPITAL AND PHYSICIANS ABOUT ANY ILL EFFECTS RESULTING FROM THE USE OF THE OPTIFAST DIET, AND

B. WHETHER ANY PERSONS DIED WHILE ON THE OPTIFAST DIET, AND IF SO, WHAT THE NAMES AND ADDRESSES OF SUCH PERSONS WERE.

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The Petitioner, Nanette E. Quenneville, Executrix of the Estate of Charles F. Quenneville, deceased respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the Sixth Circuit entered in this proceeding on December 22, 1982.

OPINION BELOW

The Court of Appeals for the Sixth Circuit filed an opinion on December 22, 1982. A copy of the opinion appears in the Appendix hereto (App. A).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 22, 1982. This petition for certiorari was timely filed within ninety (90) days of the said date, pursuant to Rules 20 and 28, and 28 U.S.C §2101(c)

STATEMENT OF THE CASE

This case pursuant to 28 U.S.C. §1332(A), originated as a diversity action for malpractice against defendants Saul M. Genuth, M.D., Victor Vertes, M.D., Irene Hazelton, M.D. and the Mount Sinai Hospital, and for strict products liability against defendant Delmark Company, Inc. The cause of action arose out of the death of plaintiff's decedent, Charles F. Quenneville, who died on December 25, 1977 while participating in the Optifast liquid diet program administered by the defendant physicians at Mount Sinai Hospital in Cleveland, Ohio, which program used the Optifast liquid protein product manufactured by defendant Delmark; the decedent had been

treated for approximately seven months and had lost more than one hundred eighty pounds (180 lbs.).

The plaintiff filed a complaint on July 26, 1978, alleging that plaintiff's decedent had been negligently cared for and treated by the defendant physicians and the defendant hospital, while taking part in he Optifast diet program administered by those defendants; that the Optifast product, which was used in the diet program, and had been manufactured by defendant Delmark Company, was dangerously defective; and that all the defendants had failed to warn plaintiff's decedent, Mr. Quenneville of the hazards of using Optifast.

In the course of the proceedings plaintiff submitted a set of interrogatories to the defendant-physicians, who on the ground of privilege objected to answering two of the questions submitted to them. Subsequently, plaintiff filed a motion to compel these defendants to answer these two questions. (See Appendix C) On September 26, 1980, the Court issued an order denying plaintiff's motion to compel. (See Appendix B) Plaintiff's subsequent motion to reconsider was also denied.

The case went to trial before the Court and jury on May 26, 1981; and, on June 15, 1981, the jury having rendered a verdict in favor of the defendants, the

Court entered its judgment, dismissing plaintiff's complaint. The judgment was filed on June 16, 1981.

A notice of appeal and a certified record were filed; briefs were submitted; oral arguments were conducted; and on December 22, 1982 the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court. (See Appendix A)

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REASONS FOR GRANTING THE WRIT

INTRODUCTION

In denying plaintiff the right to discover the names of other patients who had been on the same diet as plaintiff's decedent, the trial court unjustifiably departed from the usual and accepted course of judicial proceedings.

Such departure, as sanctioned by the United States Court of Appeals for the Sixth Circuit, thwarted plaintiff's ability to present her case and denied her a fair trial.

ARGUMENT

BECAUSE THE DISCOVERY RULES ARE "ACCORDED A BROAD TREATMENT", THE DISCOVERY OF THE NAMES OF PATIENTS IS PERMITTED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE PHYSICIAN-PATIENT PRIVILEGE SHOULD NOT BE EXTENDED TO PROHIBIT SUCH DISCLOSURE.

Mr. Justice Brennan in this Courts decision Reproductive Services, Inc. v. Walker, 439 U.S. 1307 (1978) stated

> The question...-whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients - is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it.

In the case at bar, this very question is being presented even if in a different factual context.

As part of her interrogatories submitted to the defendant hospital and the defendant physician, the plaintiff asked the following questions:

> 11. Has any person other than the plaintiff herein complained to you about any ill effects resulting from the use of OPTIFAST? If there have been other such complaints, state the name and address of each complainant.
>
> 13. Please state the name and address of each and every person who died while on the OPTIFAST diet program.

The defendants objected to question eleven (11) on the ground of privilege and to question thirteen (13) on the ground of both privilege and relevancy. Plaintiff then filed a motion to compel discovery of the requested information, which was denied by the trial court. The court reached this conclusion by

distinguishing the two cases cited by the plaintiff, Nichols v. Leimbach, C69-241 (S.D. Ohio June 7, 1972), and Grant Hospital v. Nichols, 273 N.E.2d 144 (Ct. App. Franklin County 1971).

The trial court distinguished Nichols v. Leimbach, on the ground that providing names of any patients would also reveal a specific diagnosis and the prescribed treatment. It is submitted that the discovery of the names of patients who complained of ill effects of the Optifast diet or died while taking part in the program at Mount Sinai Hospital would only reveal the fact that, at the time these patients commenced the diet, they were grossly overweight. "Being grossly overweight" is not a

specific medical diagnosis, but rather an external symptom which may be observed by any lay person.

Under the applicable Ohio law, see, Conneticut Mutual Life Insurance Co. v. Union Trust Co., 112 U.S. 250, 256 (1884); Palmer v. Fisher, 228 F.2d 503 (7th Cir. 1955); Ranger, Inc. v. Equitable Life Assurance Society of the United States, 196 F. 2d 968 (6th Cir. 1952), the following portions of §2317.02 of The Ohio Revised Code are relevant to the issue in question:

> The following persons shall not testify in certain respects:
> ...
> (B) A physician concerning a communication made to him by his patient in that relation or his advice to his patient... (emphasis added)

Such statute being in derogation of the common law must be strictly construed. Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947); Carson v. Beatley, 82 N.E.2d 745 (Ct. App. Champaign County, 1948). Simply stated the observation of the physical condition of being overweight does not require any confidential communication in the sense of §2317.02 of the Ohio Revised Code.

As then Chief Judge Brennan stated

> The nature of the privilege has never been extended to prohibit the disclosure of evidence as to facts not acquired in a professional capacity. Incidents and facts which are plain to the observation of anyone are not within the prohibition. (emphasis added)

In re Albert Lindley Lee Memorial Hospital, 155 F. Supp. 643, 645 (W.D.N.Y. 1953), citing Klein v. Prudential Insurance Co. of America, 177 N.E. 942 (Ct. App. N.Y. 1917). The trial court failed to distinguish between the symptom of being overweight, and the underlying disease causing such physical condition. The symptom is plainly visible to anyone, and, therefore cannot be privileged. The disease itself, of which the plaintiff has not requested disclosure, is a matter between physician and patient, subject to the protection of §2317.02.

A similar argument can be made with respect to the treatment prescribed in the Optifast program. The basic or standard treatment used at the Optifast clinics, including Mount Sinai, consists

of semi-starvation, supplemented with a liquid supplement of amino-acids and glucose as well as certain mineral and vitamin supplements. The treatment also includes regular examinations and individualized prescriptions, and eventually a "custom-designed diet". Any details with respect to that part of the treatment are not disclosed by revealing the fact that a person has participated in the Optifast program. Such details remain privileged information, until the patient agrees to disclose them. Again the Court failed to make an important distinction; namely, between the basic principles of the program, that is protein-supplemented, semi-starvation, and individual treatment of each patient, adapted to the specific needs of every

patient. It is the individual treatment that is privileged, and that will not be revealed simply by disclosing the fact of someone's participation in the Optifast program.

The trial court distinguished Grant Hospital v. Nichols, supra, on the ground that there is hardly any need for confidentiality when patients are being treated for a "staph" infection, but that that need is obvious for people seeking treatment for obesity. In the trial court's analysis, persons with "staph" infection would be more likely to seek treatment for their condition, in spite of the possibility of becoming part of a public record, than would people who are overweight.

The stigma of obesity is attached to the condition of being overweight; being thin is fashionable; being thin is the norm. Even the Venus of Milo is "overweight" according to today's standards of fashion! For that reason alone overweight people are encouraged to lose weight, and the attitude of society is very positive towards overweight people who have the courage to deny themselves the delights of food, with which they are perpetually surrounded. A survey of newspapers and popular magazines will show, almost as a regular feature, articles about losing weight and about people who have participated in the weight loss programs. The trial court's statement that a stigma is attached to seeking treatment for obesity, so that

fear of publication would deter obese people from obtaining treatment for their condition, is entirely inconsistent with that fact. It is again inconsistent with the observation of Brennan C.J. in In re Albert Lindley Lee Memorial Hospital, supra at 646

> The court cannot understand how a person is injured by the disclosure of the fact that he has received the services and care of a hospital, and has been attended by a certain physician. These are everyday incidents of life occurring openly and with notoriety. The patient does not secrete his entry into the hospital; neither does the doctor mask his identity when entering the home or the room of his patient. Any injury to the patient is hypothetical rather than actual.

Furthermore, the information requested by the plaintiff was sought as part of pretrial discovery, where in

Ohio, the trial court may allow the exchange of privileged information. Such an exchange does not constitute a waiver. See State ex rel Floyd v. Court of Common Pleas of Montgomery County, 55 Ohio St.2d 17, 377 N.E.2d 794 (1978); Floyd v. Copas, 9 Ohio O.3d 198 (C.P. Montgomery County, 1977).

Accordingly even if names of patients were deemed privileged, which it is submitted they are not, these names should still be discoverable.

The trial court's denial of plaintiff's motion to compel discovery prevented the plaintiff from discovering information that was important for her preparation for trial. The scope of

discovery in federal actions is governed by Rule 26(b) of the Federal Rules of Civil Procedure, which rule

> has been generously construed to provide a great deal of latitude for discovery.

Harris v. Nelson, 394 U.S. 285 (1969). Rule 26(b)

> apparently envisions generally unrestrictive access to sources of information, and the courts have so interpreted it.

Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir. 1961). The same wide range of discovery has been recognized by the District Court of Ohio, Armour Research Foundation of Illinois Institute of Technology v. Brush Development Co., 9 F.D.R. 113 (1949). And it seems useful, in this context to

repeat the well-known passage from Hickman v. Taylor, where the United States Supreme Court said:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

329 U.S. 495, 507-508 (1947). As the rule itself states, it is not required that the information sought will be

admissible at trial. The information need only be relevant to the subject matter involved in the pending action. See Foundry Equipment Co. v. Carl Mayer Corp., 11 F.R.D. 108 (N.D. Ohio E.D. 1950) and Fleming v. Bernardi, 1 F.D.R. 624 (N.D. Ohio E.D. 1941). Obviously, it was relevant to the issues of plaintiff's case to find out whether any participants in the Optifast program had complained of ill-effects of the diet, or whether any participants had died while they were on the diet. It was very important for the plaintiff to discovery whether Mr. Quenneville's death was an isolated case, or whether more persons had experienced difficulties with the Optifast liquid protein diet. The trial court's denial of plaintiff's motion to compel discovery

was prejudicial in the sense that it prevented the plaintiff from discovering information that was important for her preparation for trial.

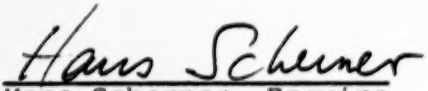
In addition, the plaintiff was prejudiced, because the trial court, by refusing to admit any evidence concerning the problems with the Optifast diet, allowed the creation of the impression that the defendants had 600,000 patient weeks of experience with Optifast without any problems, except, possibly, for the death of Mr. Quenneville. (See direct examination of defendant's expert, Dr. Norval Barker, Appendix D, F). At the end of his testimony Dr. Barker said that he did not have any knowledge of any deaths of any patients, other than Mr. Quenneville , that were related to the

Optifast program or not explained by other medical reasons. Because the plaintiff had not been allowed any discovery of this aspect of the case, she was left without any means to refute this statement of the defendant's expert witness, a circumstance that was highly prejudicial, because it left the jury with the impression that the defendant physicians and other physicians prescribing Optifast had treated 60,000 patients for an average of ten weeks each, without ever having had any complaints.

The plaintiff submits that the refusal on the part of the trial court to allow discovery of relevant information led to an unbalanced presentation of case, in favor of the defendants, all of

which warrants the resolution of the underlying issues and a new trial. Therefore the petitioner prays that a writ of certiorari be issued.

Respectfully submitted,



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Counsel for Petitioner

CERTIFICATE OF SERIVCE

The undersigned hereby certify that one copy of the foregoing Petition for Writ of Certiorari with Appendix has been furnished to each of the following attorneys.

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Saul M. Genuth, M.D. and
Irene Hazelton, M.D.

Hans Scherner

Hans Scherner
Admitted March 28, 1983

Russell H. Volkema

Russell H. Volkema

APPENDIX

APPENDIX

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Filed December 22, 1982

No. 81-3429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NANETTE E. QUENNEVILLE,
Executrix of the Estate of
Charles F. Quenneville

Plaintiff-Appellant

v.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.

Defendants-Appellees

O R D E R

BEFORE: LIVELY AND KENNEDY, Circuit Judges; FAIRCHILD, Senior Circuit Judge.*

This is an appeal by the plaintiff from a judgment in a wrongful death

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* The Honorable Thomas Fairchild, Senior Judge, U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

action based on a jury verdict in favor of all the defendants. There is no allegation of error in the jury instructions and the only issues relied upon by the plaintiff-appellant relate to evidentiary rules by the trial court. The trial court sustained an objection on grounds of privilege to certain pretrial interrogatories served on the defendants. In these interrogatories the plaintiff sought to discover whether other persons had complained to the defendant hospital and physicians about ill effects of the product involved or had died while using the product. Applying Ohio law, the trial court held that this information was not discoverable. The plaintiff also complains that she was denied the right to introduce evidence of changes in the product subsequent to her decedent's

death. The trial court ruled that such evidence was not admissible, relying on this court's decision in Bauman v. Volkswagenwerk A.G., 621 F.2d 230 (1980). Finally, the plaintiff charges error in the trial court's refusal to permit her to introduce rebuttal evidence.

Privileged matters are not discoverable. Rule 26(b)(1), Fed. R. Civ. P. In a civil action based on diversity jurisdiction questions of privilege are determined in accordance with state law. Rule 501, Fed. R. Evid. The district court relied on the state law in sustaining the defendants' objections to the interrogatories concerning complaints and deaths related to the product, and we find no error in that ruling. It also appears from the record that one of plaintiff's expert

witnesses had the information sought by the interrogatories available at the time of trial. This would render any error in the ruling harmless.

The purpose of plaintiff's attempt to prove a subsequent change in the product is not clear from the record. Rule 407, Fed. R. Evid. limits the admissibility of such evidence. The plaintiff argues that she offered the evidence, a label from a later version of the product with a somewhat different ingredient mix, for the purpose of impeaching the testimony of a witness who had appeared for the defendants. Though counsel for the plaintiff did state that the evidence was offered for impeachment, he stated to the district court that he would have used the evidence "for several reasons." No clear statement appears as

to how the tendered evidence would have impeached earlier testimony. Based on the record before us (some side bar conferences were not recorded) we conclude that the trial court did not commit prejudicial error in sustaining the defendants' objections to evidence of subsequent measures taken by the manufacturer of the product. We conclude further that the district court did not abuse its discretion in ruling on rebuttal and surrebuttal evidence.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

A TRUE COPY
Attest:
John P. Hehman, Clerk
By: _____
Deputy Clerk
ISSUED AS MANDATE: January 13, 1983
COSTS: None

Filed September 26, 1980

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NANETTE E. QUENNEVILLE, etc. Plaintiff v. DELMARK COMPANY, INC. et. al., Defendants.	)	CIVIL ACTION NO. C78-915 MEMORANDUM AND ORDER

ALDRICH, J.

This is a wrongful death action. Plaintiff contends that her husband, as a direct result of being on the Optifast diet, died. Consequently, she has filed suit against the manufacturer of the Optifast diet product, the hospital where her husband was treated, and the physicians who supervised his treatment.

Now pending before the Court is plaintiff's Motion to Compel defendants to answer Interrogatories Nos. 11 and 13.

Interrogatory No. 11 request defendants to provide the names and addresses of any other patients who have complained of "ill effects" from the use of Optifast. Interrogatory No. 13 requests defendants to provide the names and addresses of any patients who have died while on the Optifast diet. Defendants' objection is based on the physician/patient privilege.

The Court denies plaintiff's motion. Plaintiff cites two cases for the proposition that the names and addresses of patients are not privilege communications, but neither of these cases is on point.

Nichols v. Leimback, C69-241 (S.D. Ohio June 7, 1972) held that providing the names and addresses of patients who had undergone surgery on a particular day was not a violation of the physician/patient privilege. Neither the type of surgery, nor the diagnosis, was requested. However, since the use of Optifast is limited to patients who suffer from morbid obesity, providing their names and addresses is publicizing the specific diagnosis and prescribed treatment of those individuals.

Grant Hospital v. Nichols, 27 O. App.2d 166 (1971) concerned only the question of whether a discovery order was a final order subject to immediate appellate review. The court, however, made a statement in dicta to the effect that neither a name or address given to

any admission clerk, nor an indication on the hospital records that a patient suffered a staph infection while hospitalized, were privileged communications. However, the stigma and embarrassment attached to a diagnosis of staph infection was certainly negligible. Hence, the need for confidentiality is not very great, if it exists at all. On the other hand, many people might be deterred from seeking necessary treatment for obesity if they become part of a public record.

Plaintiff's Motion to Compel Discovery of these names and addresses is therefore denied.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

FILED February 28, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NANETTE E. QUENNEVILLE,
Executrix of the Estate of
Charles F. Quenneville,

Plaintiff, Case No. C78-915

vs. Judge Ben C. Green

DELMARK COMPANY, et al.,

Defendants.

MOTION

Plaintiff moves the court for an order requiring the defendants, Mt. Sinai Hospital of Cleveland, Victor Vertes, M.D., Saul M. Genuth, M.D. and Irene Hazelton, M.D. to answer Interrogatories number 11. and 13.; the interrogatories and answers given are as follows:

"11. Has any person other than the plaintiff herein complained to you about any ill effects resulting from the use of OPTIFAST? If there have been other such complaints state the name and address of each complainant.

ANSWER: Yes. Objection: The names and addresses of any such patients are confidential and not subject to discovery. See Federal Civil Rule 26(b)(1).

13. Please state the name and address of each and every person who died while on the OPTIFAST diet program

ANSWER: Objection: The information sought in this interrogatory is not relevant to the subject matter of this case and is not reasonably calculated to lead to discovery of

admissible evidence. See Civil Rule 26(b)(1). Additionally the names and addresses of any such individuals would be, in any event, confidential and subject to discovery. See Federal Civil Rule 26(b)(1)."

MEMORANDUM

In order for plaintiff to show that there was a general pattern of ill effects on persons being treated with OPTIFAST it is essential for plaintiff to have the names and addresses of such patients. Giving the names and addresses of such patients does not give the plaintiff the right to probe into the medical records of these patients but it does give the plaintiff the right to contact the patients, or the families of the patients, and request permission of

these patients to examine their records, or to discover whatever information is available from the patients themselves.

Interrogatory number 13 is objected to by the defendants on the basis that an answer to such an interrogatory would not be relevant to the subject matter in this case. The requested information is relevant to the subject matter in this case. The plaintiff would like to know whether or not the people who died while on this OPTIFAST diet died as a result of the OPTIFAST diet or as a result from some other condition. Again, by this means plaintiff can show a general pattern of catastrophic results from the use of this diet program.

Respectfully submitted,

VOLKEMA & SARAP

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Phone: (614) 221-5207

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion and Memorandum upon Robin G. Weaver, Attorney for Defendants Victor Vertes, M.D., Saul M. Genuth, M.D. and Irene Hazelton, M.D., 1800 Union Commerce Building, Cleveland, Ohio 44115; Crawford Morris, Attorney for Defendant Mt. Sinai Hospital of Cleveland, 1144 Union Commerce Building, Cleveland, Ohio 44115 and Timothy T. Reid, Attorney for Defendant Delmark

Company, Inc. 1404 Rockefeller Building Cleveland, Ohio 44113 by U.S. Mail, postage prepaid, on this 26th day of February, 1979.

Russell H. Volkema

By Mr Paisley:

Q. Now, you heard, I think, Dr. Sours or Dr. Hardie, one or the other, say that liquid protein or, at least, Optifast as use in the program would not sustain life.

Would you tell us, did you pursuant to my request, determine how many patient weeks Optifast has been used to date.

A. Yes, I did.

Q. And what is that?

A. 600,000 patient weeks.

Q. How does that translate to number of patients?

A. This would be about 60,000 patient.

Q. And other than the claim made here in this courtroom regarding Mr. Quenne-ville, do you have any knowledge of any deaths on any of the other 60,000 patients?

A. Not as related to the program or that were not explained by other medical reasons.

MR. PAISLEY: Thank you.

MR. SCHERNER: Your Honor, before beginning cross-examination, could we approach the bench?

(Discussing ensued off the record out of hearing of the jury at side bar.)

By Mr. Paisley:

Q. One Point, Doctor, before I sit down, as of the end of 1977, how many patient weeks, do you recall?

A. As I recall it would be approximately 250,000 patient weeks.

Q. How would that translate to patients?

A. This would have been 25 to 30 thousand patients.

MR. SCHERNER: Your Honor, you also requested me to bring up the two other issues regarding the questions that I have.

I request to be permitted to ask in reference to the 60,000 patients and 600,000 patient weeks --

THE COURT: Hours on the Optifast.

MR. SCHERNER: I just wanted to indicate that I requested the right to ask questions in view of the Court's ruling not to mention Optifast-70.

I requested the Court's permission to ask questions for impeachment purposes under Rule 407 regarding the fact that some of the 60,000 patient weeks were in fact not with Optfiast as it was being utilized in 1977.

At that time it was my understanding that the Court overruled, or at least --

THE COURT: The Court indicated, I think, when that question was aksed to direct, that you did not object to the question, but wasn't until your cross-examination to suggest to the Court that you be permitted to mention the fact that Optifast had changed its formula after the the death of Mr. Quenneville.

And the Court had ruled a long time back that the evidence would not be admissible as being highly prejudicial. It's Rule 60 something.

MR. SCHERNER: 407.

THE COURT: Yes.

MR. SCHERNER: I would just like to proffer the evidence of what that would have presented, for impeachment purposes.

I would have asked just one question and not a series of questions.

Office - Supreme Court, U.S.
FILED
APR 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1581

In the Supreme Court of the United States

October Term, 1982

NANETTE E. QUENNEVILLE, Executrix of the Estate of Charles F. Quenneville,

Petitioner,

vs.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF CONTRA CERTIORARI

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REASONS FOR DENYING THE WRIT

Petitioner asserts as her reason for granting a writ of certiorari that the trial court unjustifiably departed from the usual and accepted course of judicial proceedings when it denied the plaintiff the right to discover the names of other patients who had been on the same diet as plaintiff's decedent. Petitioner contends that the departure thwarted her ability to present her case and denied her a fair trial.

Petitioner has not demonstrated the manner in which the trial court departed from "the accepted and usual course of judicial proceedings" by determining, within its sound discretion, that the information sought by the plaintiff was privileged and thus not discoverable.

Petitioner has not shown how the trial court's alleged departure "thwarted" her ability to present her case and denied her a fair trial. The plaintiff's theory at trial was that plaintiff's decedent was negligently exposed to "an extra hazardous and dangerous diet" while on the Mt. Sinai Diet Program. As the Sixth Circuit Court of Appeals stated in its opinion,

> ". . . it also appears from the record that one of plaintiff's expert witnesses had the information sought by the Interrogatories available at the time of trial. This would render any error in the ruling harmless." (Petitioner's brief, appendix pages 8-3 & 4.)

Plaintiff was fully aware of the components of the Mt. Sinai Diet Program for the treatment of morbid obesity at the time of trial. Plaintiff produced three expert witnesses who openly expressed their opinions as to what they believed to be the substandard nature of the Mt. Sinai Diet Program. Plaintiff had a full and fair opportunity to litigate the issues in her case which opportunity was not abridged by the District Court's refusal to compel Answers to plaintiff's Interrogatories requesting the names of all individuals who complained about any ill effects or who died while on the Mt. Sinai Diet Program which utilized Optifast.

Petitioner must do more than simply assert that the trial court departed from usual judicial procedure. Petitioner must do more than merely contend that she was denied a fair trial.

ARGUMENT

BECAUSE THE DISCOVERY RULES ARE "ACCORDED A BROAD TREATMENT," THE DISCOVERY OF THE NAMES OF PATIENTS IS PERMITTED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE PHYSICIAN/PATIENT PRIVILEGE SHOULD NOT BE EXTENDED TO PROHIBIT SUCH DISCLOSURE.

The petition for a writ of certiorari does not appear to be directed toward defendant Delmark. Plaintiff's theory of liability as against Delmark at the trial was strict products liability. Petitioner appears to be seeking the writ of certiorari on the basis that the trial court erred in prohibiting the plaintiff from discovering from the defendant physicians and defendant hospital, the names and addresses of individuals complaining to the physicians about ill effects while using Optifast and the names of any people who died while on the Optifast diet program. The discovery sought by the plaintiff was directed to the physicians and in no way involved defendant Delmark.

However, since plaintiff's petition for a writ of certiorari also asserts that her ability to present her case was thwarted and she was denied a fair trial, defendant Delmark is compelled to address the discovery issues insofar as they are alleged to relate to plaintiff's presentation of her case and the fairness of her trial.

While discovery rules are accorded broad treatment, they are not without limitations. "Privileged matters are not discoverable." Rule 26(B)(1) Federal Rules of Civil Procedure.

Petitioner argues that discovery of the names of persons who complained of ill effects or who died while on the Optifast diet "would only reveal that at the time these patients commenced the diet, they were grossly overweight." Petitioner characterizes "being grossly overweight" as a cosmetic problem rather than as a chronic disease. Revelation of the requested information would indicate individuals with heart conditions, hypertension, arthritis, diabetes in conjunction with emotional and mental problems associated with the severe chronic disease of obesity.

Obviously, conditions such as heart disease, diabetes, hypertension, mental and emotional trauma are not "plain to the observation of anyone" such that Petitioner would be justified in relying upon *In Re Albert Lindley Lee Memorial Hospital*, 209 F.2d 122 (1953) and *Klein v. Prudential Insurance Co. of America*, 177 N.E. 942 at pages 12 and 13 of Petitioner's Brief. Moreover, the cases cited by Petitioner are distinguishable on the facts.

Petitioner is well aware that when applying to Mt. Sinai, Charles Quenneville completed a questionnaire answering such questions as his weight from age 10 to present, other methods of diets previously tried and for how long, how much weight was lost on those diets, eating habits, symptoms (shortness of breath, falling asleep at odd time, back pain, swelling of legs, etc.), illnesses (diabetes, heart disease, high blood pressure, kidney disease, psychiatric treatment), current medications and the applicant's reasons for wanting to lose weight. Charles Quenneville's treating physician, Dr. Stoyka, wrote to Mt. Sinai on March 18, 1977, indicating that Mr. Quenneville was under his care for hypertension and pathologic obesity.

Clearly, all of these symptoms, physical, mental and emotional, are communications by patients to their physi-

cian on the Mt. Sinai Diet Program. The symptoms, past history, reasons for losing weight, are not plain to the observation of anyone but are part of the intricate process of a physician examining, diagnosing and treating an individual patient.

It is stated in *In Re Roberts,* 106 Ohio App. 303 (1958 Cuyahoga County):

> "It will be noted from the foregoing that privileged communications between patient and physician may be by exhibition of the body to the physician for examination or treatment as well as by oral or written communications between physicians and patients and that a physician may not testify in respect to either unless there is a waiver in reference thereto." (*Id.* pg. 309.)

In the case at bar, the Mt. Sinai physicians were not at liberty to reveal the names and addresses of individuals who had presented themselves to the doctors, voluntarily, for examination and treatment of the disease of morbid obesity.

It was stated in *In Re Winstead,* 67 Ohio App. 2d 111 (Summit Cty. 1980):

> "The rationale for excluding material evidence offered by a treating physician is to encourage free disclosure by the patient to the doctor and, thus, to facilitate proper diagnosis and treatment.
>
> When the privilege arises, it belongs to the patient. The primary prerequisite to the creation of '. . . the privilege' is that the patient must have consulted the physician for treatment or for diagnosis looking toward treatment." (*Id.* pg. 114.)

It was held in *General Motors v. The Director of N.I.O.S.H.*, 459 F. Supp. 235 (S.D. Ohio 1978):

> ". . . Generally, an Ohio physician may not disclose a patient's medical records without the patient's consent. ORC §2317.02 and 4731.22; *Hammonds v. Aetna Casualty & Surety Co.*, 237 F. Supp. 96 (N.D. Ohio 1965).
>
> The purpose of this rule '. . . is to encourage patients to make a full disclosure of their symptoms and condition to their physicians without fear that such matters will later become public.' *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548, 551 (1964). . .
>
> In the absence of some compelling need to identify individuals at this time by N.I.O.S.H., it would seem that individual rights of a person should not be taken from him without his knowledge and without an opportunity to be heard." (*Id.* pg. 239.)

Providing the names and addresses of individuals with complaints of ill effects while on the Mt. Sinai diet would be publicizing a specific diagnosis of morbid obesity and the prescribed treatment for each individual. It is precisely this type of publication which the physician/patient privilege is designed to protect.

Petitioner admits at page 13 of her Brief "that the disease itself, of which the plaintiff has not requested disclosure, is a matter between physician and patient, subject to the protection of §2317.02." Petitioner claims she did not request the revelation of the underlying disease causing the physical condition of being obese. However, Petitioner did not merely request the weights of all persons on the Mt. Sinai Diet Program. Petitioner asked for the names and addresses of all persons having complaints of ill effects

while taking Optifast. Were defendants to reveal the names and addresses of all persons having complaints of ill effects while taking Optifast, defendants would, without an express waiver from all of those individuals, be revealing to plaintiff the specific disease of morbid obesity, the treatment they were receiving, i.e., Optifast and the Mt. Sinai Diet Program. Under Ohio law, a physician may not testify with respect to his examination of any patient's body or the treatment prescribed to that patient or any oral or written communication made by the patient to the physician absent a waiver from the patient.

Petitioner's argument with respect to society's view of the stigma of obesity is totally without support in the record and has absolutely no bearing upon whether or not the trial court unjustifiably departed from the usual and accepted course of judicial proceedings by precluding the plaintiff from discovering the names and addresses of all persons who had complained of any ill effects resulting from the use of the Optifast diet or who died while on the diet.

It should again be specifically noted that plaintiff's expert, Dr. Sours, had the information sought by the Interrogatories available at the time of the trial. Dr. Sours testified as to the number of individuals who had reportedly died while using some form of a "liquid protein" diet. Even if the trial court erred in not compelling answers to the Interrogatories on the basis of privilege, the error was harmless and has not been shown to have "thwarted" plaintiff's presentation of her case at trial and the Sixth Circuit Court of Appeals so held.

While it is true that the trial court may allow the exchange of privileged information, whether or not the trial court does so is purely discretionary. Petitioner has

not demonstrated any abuse of discretion on the part of the trial court. Petitioner asserts that the trial court's denial of the motion to compel discovery "prevented the plaintiff from discovering information that was important for her preparation for trial." Yet, Petitioner never indicates why the information was important for her preparation for trial, particularly since plaintiff's expert, Dr. Sours, already had the information plaintiff was seeking.

Petitioner's argument with respect to the testimony of Dr. Norval Barker, Delmark's expert witness, is totally without merit. Petitioner argues that the trial court, by refusing to admit any evidence concerning the problems with the Optifast diet, allowed the creation of the impression that the defendants had 600,000 patient weeks of experience with Optifast without any problems, except, possibly, for the death of Mr. Quenneville. As Petitioner well knows, there was no objection to the question posed to Dr. Norval Barker as is specifically indicated in Appendix, pages D-1 and D-2 to Petitioner's Brief. Even though counsel for the plaintiff failed to object to counsel for Delmark's question to Dr. Norval Barker, the question was in fact modified for the benefit of the jury so that it inquired only as to the number of patient weeks Optifast had been used as of the end of 1977. Petitioner's assertion that she was prejudiced because the trial court allowed the creation of the impression that defendant had 600,000 patient weeks of experience with Optifast without any problems is an attempt to mislead this court. The record of Dr. Norval Barker's direct testimony, as contained in Appendix D-1 and D-2 of Petitioner's Brief, clearly indicates that, as of the end of 1977, Optifast had been used for 250,000 patient weeks which is equivalent to approximately 25,000 to 30,000 patients.

Petitioner has failed to demonstrate how she was prejudiced by a question to which there was no objection and one which was modified following a side-bar conference.

CONCLUSION

Disclosing the names and addresses of all persons having complaints of ill effects while taking Optifast on the Mt. Sinai Diet Program would have violated the physician/patient privilege since the only reason for applying to Mt. Sinai's Diet Program was to be treated for the specific disease of morbid obesity, regardless of the underlying cause of the disease. The patients were not being treated for the cosmetic symptom of obesity but were being treated for the disease, whether caused by diabetes, hypertension, emotional distress or genetic abnormality.

Petitioner's argument with respect to the testimony of Dr. Norval Barker pertaining to the number of patient weeks of experience with Optifast is totally without merit. Petitioner failed to demonstrate how she was prejudiced by a question to which there was no objection and one which was modified following a side-bar conference.

The trial court and the Sixth Circuit Court of Appeals followed the accepted and usual course of judicial proceedings by determining that the information sought by plaintiff was protected by the physician/patient privilege and was not discoverable. Petitioner has not demonstrated the manner in which the trial court or the Court of Appeals departed from the accepted and usual course of judicial proceedings nor has Petitioner demonstrated how any

alleged departure thwarted her ability to present her case and denied her a fair trial.

Respectfully submitted,

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REASONS FOR DENYING THE WRIT

The Respondent, Mt. Sinai Hospital of Cleveland, incorporates by reference the Brief Contra Certiorari as filed by Respondent, Delmark Company, Inc. The argument and citations contained therein will not be superfluously restated.

Rule 17 of the Revised Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari. It provides as follows:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

While the above-cited is not controlling, the Petitioner has not raised a conflicting Federal Court of Appeals decision or a Federal question conflicting with a state court of last resort or an unsettled question for the Supreme Court's consideration. The Petitioner has also failed to identify a substantial Constitutional issue.

The questions presented by the Petitioner are limited to the Trial Court's discretion to prevent discovery of otherwise privileged information. A review of the record, as alluded to by the Court of Appeals, reveals that one of the Petitioner's expert witnesses, Dr. Harold Sours, had access to the information sought.

ARGUMENT

REQUEST FOR DISCOVERY OF OTHERWISE PRIVILEGED INFORMATION IS GOVERNED BY THE DISCRETION OF THE TRIAL COURT AND IN THE ABSENCE OF ESTABLISHING RELEVANCY AND/OR PREJUDICE SHALL BE PROHIBITED FROM DISCLOSURE.

The Petitioner asked the Trial Court to breach the privilege of confidentiality which is traditionally a basic premise of a physician-patient relationship. The Federal District Court for the Northern District of Ohio has addressed the issue in the case of *Hammond v. Aetna* (1965), 237 F. Supp. 96 and 243 F. Supp. 793 by indicating that the physician-patient privilege reaches to restrain those that seek to induce others to reach such confidentiality.

Williams v. Thomas Jefferson University, et al. (U.S.D.C., E.D. Pa. 1972), 343 F. Supp. 1131 is a case involving almost identical questions. It also was a mal-

practice action against a hospital where the plaintiff-patient sought discovery via interrogatories of the identity of other patients who had undergone treatment similar to plaintiff. In forbidding the discovery, the Court in its opinion said:

> "This is a malpractice case against a hospital and a doctor. Plaintiff has filed interrogatories seeking information from the hospital about women upon whom therapeutic abortions were performed in 1969 so that certain inquiries can be directed to them. In this way, plaintiff hopes to obtain evidence from former patients of the doctor so that his credibility can be impeached. The hospital objects to furnishing the information on the grounds that it is privileged.
>
> "I agree that the questions need not be answered. In the abstract, abortion is discussed openly and with fervor. Nevertheless, it is an extremely personal thing to each woman who has had an abortion. The consequences of allowing revelation and examination when considered in terms of family relationships and individual friendships could be disastrous to the subjects of an inquiry of the type plaintiff wants to make. A collateral attack for impeachment purposes does not weigh very heavily in a balancing of interests when opposed to such obvious reasons for privacy." (p. 1132)

In *Berman et al. v. Duggan et al.* (C.P. Allegheny County, Civil Division 1971), 119 Pitt. Legal J. 226, the patient's right to privacy was even protected against a search of hospital records for evidence relevant to a criminal prosecution of three physicians on the charge of conspiracy to commit illegal abortions at a designated hospital on a specific date. A subpoena had been issued, at the request of the District Attorney, directing the hospital involved to produce the medical records of all patients

who had undergone therapeutic abortions at the hospital during the preceding year and other pertinent information given by these patients to the hospital and their physicians. Three former patients of the hospital who had obtained therapeutic abortions, thereupon instituted a class action on behalf of themselves and all other women whose medical records were to be produced, seeking an injunction prohibiting the hospital from disclosing any personal information about them pursuant to the District Attorney's subpoena. In support of their claimed right to object to the production of their records, plaintiffs relied upon the physician-patient privilege.

In holding that the hospital records constituted privileged communications immune from discovery which rendered the subpoena issued for their production void, the Court said:

> "* * * Although the hospital records might be of some aid in the investigation of the criminal charges filed against the three physicians, this court recognizes a paramount public interest in maintaining the confidential relationship between physician and patient. The detrimental effect upon a physician's ability to tend to his patient in a responsible professional capacity is much too great a price to pay for any possible benefit to be derived from sifting through voluminous records of personal data in search of evidence." (p. 236)

The Petitioner reasons that her Writ for Certiorari should be granted because the Trial Court departed from the usual and accepted course of judicial proceedings denying her a fair trial. Quite the contrary is the fact. The above-cited contradicts the contention that the court departed from accepted courses of judicial proceeding. As to a fair trial, not only did the Petitioner's experts, two

of whom were previously with the Center for Disease Control, testify with full knowledge of the information sought, but over objection of the Respondents, the Court permitted rebuttal expert testimony.

The Petitioner argues that since she only sought names and addresses of other persons participating on the Optifast Diet Program, it is not a breach of confidential medical diagnosis and/or treatment. If so, what value and relevancy are mere names? Each and every patient identified would presumably be required to reveal their medical diagnosis and treatment which is the very reason for the time-honored confidentiality as preserved by the physician-patient privilege.

CONCLUSION

The Petitioner has not raised a question worthy of this Honorable Court's treasured time and consideration.

The Trial Court and Court of Appeals have given the Petitioner every opportunity to be heard on the subject, and there is no basis to the contention that there has been an abuse of discretion to the Petitioner's prejudice.

Respectfully submitted,

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